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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 336 103.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

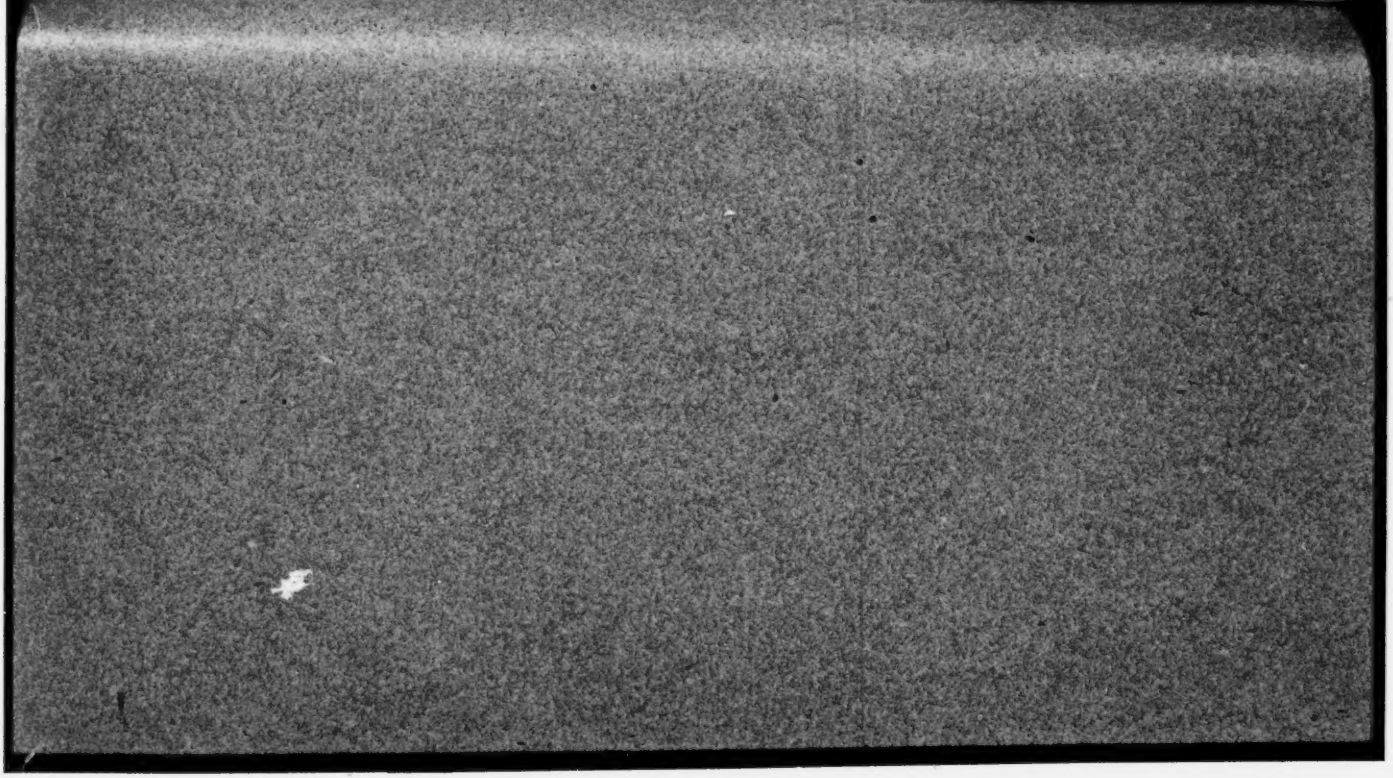
vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 21, 1899.

(17,470.)



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a The United States of America to the Commonwealth of Kentucky, Greeting:

You are hereby cited to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America one hundred and twenty-three.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

Service acknowledged this June 30th, 1899.

W. S. TAYLOR,
Attorney General of Kentucky.

b Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Statement.

Judgment appealed from was rendered September 29th, 1898, at the September term, 1898, of the Shelby circuit court, and is on pages 7 and 8 of this transcript. No summons or warning order required.

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 19th day of May, A. D. 1899.

Present: Chief Justice James H. Hazelrigg, Judges B. L. D. Guffy, George Du Relle, J. D. White, and J. P. Hobson.

CHESAPEAKE & OHIO RAILWAY CO., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee. } Shelby.

Be it remembered that heretofore, to wit, on the first day of November, 1898, the appellant, by its counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record as follows:

Preamble and Caption.

Pleas held before the Hon. Wm. Carroll, sole circuit judge of the Shelby circuit court, at the court-house, in Shelbyville, Kentucky, on the 4th day of October, 1898.

Be it remembered that on the 20th day of May, 1898, the following indictment was entered of record in the office of the clerk of the Shelby circuit court, and is in words and figures as follows, to wit:

2 Shelby Circuit Court.

THE COMMONWEALTH OF KENTUCKY
vs.
THE CHESAPEAKE & OHIO RAILROAD COMPANY. } Indictment.

The grand jurors of the county of Shelby in the name and by the authority of the Commonwealth of Kentucky accuse the Chesapeake and Ohio Railroad Company of the offense of unlawfully failing to furnish separate coaches or cars for the transportation of white and colored passengers and failing to have separate coach or compartment to bear, in some conspicuous place, appropriate letters indicating the race for which it is set apart, committed in manner and form as follows, to wit: The Chesapeake and Ohio Railroad Company did, in the said county of Shelby, on the 17th day of May, 1898, and before the finding of this indictment, unlawfully fail to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on its line of railroad, and failed to have each separate coach or compartment to bear, in some conspicuous place, appropriate words in plain letters indicating the race for which it is set apart, it, the said Chesapeake and Ohio Railroad Company, being a corporation duly authorized to do business in this State and operating, owning, controlling, and managing
3 and claiming to own, control, manage, and operate lines of railroad and passenger cars or coaches thereon in and through various counties in the State of Kentucky and through Shelby county, against the peace and dignity of the Commonwealth of Kentucky.

R. F. PEAKE,
Commonwealth's Attorney, 12th Judicial District.

"The summons issued on the foregoing indictment is in words and figures as follows, to wit:"

Shelby Circuit Court.

The Commonwealth of Kentucky to any sheriff, coroner, jailer, constable, marshal, or policeman of this State:

You are hereby commanded to summon the Chesapeake and Ohio Railroad Company to appear in the Shelby circuit court on the first day of its next Sept. term to answer an indictment for failing to furnish separate coaches, &c., found against it in said court.

Given under my hand, as clerk of said court, this 23rd day of June, 1898.

W. M. CARDWELL, *Clerk.*

Sheriff's Return.

Executed August 15th, 1898, on Chesapeake and Ohio
4 Railroad Company by delivering a true copy of the within summons to W. A. Wadsworth, he being the agent of said company.

S. P. PERRIN, *S. M. C.*,
By JAS. McKEE, *D. S.*

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 22nd, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

By consent this prosecution is continued until the 10th day of the present term of this court. Then came R. D. Smith and Harvie Bohannon, witnesses for the Commonwealth, and each acknowledged himself indebted to the Commonwealth of Kentucky in the sum of one hundred dollars, to be void, however, as to each of them who shall appear on the 10th day of the present term to testify in behalf of plaintiff and not depart without leave of court.

5 "And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 23rd, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came the defendant, by attorney, and filed demurrer to the indictment herein, and the same, being considered by the court, is overruled.

"The demurrer referred to in the foregoing order is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Demurrer.

The defendant, Chesapeake and Ohio Railroad Company,
6 demurres to the indictment herein upon the following grounds:

(1.) The indictment does not substantially conform to the requirements of article 2, chapter 2, title 6, of the Criminal Code of Practice.

(2.) The statute of this Commonwealth upon which said indictment is based, commonly known as the separate-coach law, being the act approved May 24th, 1892, and entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this State," is repugnant to the Constitution of the United States, in that it is a regulation of interstate commerce, and is therefore null and void, and a failure to comply with said statute does not constitute a public offense.

(3.) The facts stated in the indictment does not constitute a public offense.

P. J. FOREE,
Attorney for Defendant.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

7 Shelby Circuit Court, September Term, Sept. 29th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came the Commonwealth and county attorney and the defendant and appeared by attorney and pleads not guilty of the offense as charged in the indictment, and to try the issue came this jury, to wit, W. B. Arnold, J. R. Anderson, F. J. Cleveland, M. P. Cinnamon, M. Eggen, Miller Fields, J. M. Graves, Top Lewis, D. I. Shipman, Miller Wilhoite, E. C. Woods, and Noble Zaring, who were duly accepted and sworn to well and truly try the issue and a true verdict render, and, having heard the indictment read and statement of defendant's plea and the evidence of the plaintiff, the defendant moved for peremptory instructions for the jury to find for the defendant; said motion is overruled; to which defendant excepts; and the jury, having heard the evidence in full, instructions of the court, and argument of counsel, rendered this verdict: "We, the jury, find the defendant guilty and fix the fine at $500.00. J. R. Anderson, foreman." It is therefore adjudged that the defendant, The Chesapeake and Ohio Railroad Company, is guilty of the offense as charged in the indictment, and that the Commonwealth of Kentucky recover of said defendant the sum of five hundred dol-
8 lars and its costs herein expended; to all of which defendant excepts.

"The instructions of the court are in words and figures as follows, to wit:"

Instruction "A."

The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the defendant, The Chesapeake and Ohio Railroad Company, is a corporation doing business in this State, and operating, owning, controlling, and managing lines of

railroad through Shelby county, and running and managing and controlling passenger coaches and cars thereon, and within the twelve months before May 20th, 1898, failed to furnish separate coaches or cars for the travel or transportation of white and colored passengers, with each separate coach or compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart, they should find the defendant guilty and fix its fine at any sum not less than $500.00 nor more than $1,500.00.

If upon the entire case they have a reasonable doubt of the defendant's having been proved guilty, they should find it not guilty.

9 *Instruction No. 1.*

The court instructs the jury that if they believe from the evidence that the defendant furnished separate coaches for the transportation of white and colored passengers and signs for such coaches, bearing appropriate words in plain letters, indicating the race for which such coaches were set apart, they will find for defendant, though they may believe that negroes were permitted by the conductor to ride in coaches set apart for the whites or the whites in coaches set apart for negroes.

Instruction No. 2.

The court instructs the jury that if they believe from the evidence that they defendant furnished separate coaches or compartments of coaches for the travel or transportation of the white and colored passengers on its line of railroad through Shelby county, and signs, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, on May 20th, 1898, and for the 12 months previous thereto, they will find for defendant, although they may believe that at times said signs were left down by the conductors or those in charge of the trains by inadvertence or were torn down by passengers.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

10 Shelby Circuit Court, September Term, Sept. 30th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came plaintiff, by attorney, and filed motion in arrest of judgment herein. The questions on said motion being considered by the court, same is overruled; to which defendant excepts.

"The motion referred to in the foregoing order is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Motion.

Comes the defendant and moves the court in arrest of
11 judgment herein, but says that no judgment should be rendered against it for the reason that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

Second. That the law under which this indictment is found is an invasion of section 8, subsection 3, of the United States Constitution, known as the commerce clause of the Constitution, and is therefore unconstitutional, null, and void.

P. J. FOREE,
Attorney for Defendant.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 30th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Order.

Came defendant, by attorney, and moved the court to grant it a new trial herein upon written grounds filed.

12 "The grounds for a new trial referred to in the foregoing order *is* in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Motion and Grounds for a New Trial.

The defendant, Chesapeake and Ohio Railroad Company, comes and moves the court to grant it a new trial herein, and for grounds says:

First. That the court erred in overruling its demurrer to the indictment herein, to which the defendant excepted at the time.

Second. The court erred in overruling its motion for a peremptory instruction, to which defendant excepted at the time.

Third. The verdict of the jury is against the law and evidence.

Fourth. Misconduct of the jury, in that it failed to observe the law and regard the instructions of the court, by reason of which defendant has not received a fair and impartial trial.

13 Fifth. Misconduct of the Commonwealth's attorney in arguing and in saying to the jury that if they would bring in a verdict of guilty that their wives and daughters would not be compelled hereafter to ride in coaches with negroes, and that such affairs as the McEwan case would not be repeated in your State, and in also arguing to the jury that the railroad company was trying to avoid the separate-coach law; to all of which the defendant, by attorney, objected at the time. The attorney for the Commonwealth then went back to arguing the facts, and this objection was not passed upon; but by reason of this misconduct of Commonwealth's attorney, the appeal to the prejudice of the jury, the defendant was prevented from having a fair trial.

Sixth. The court erred in giving instruction "A" for the Commonwealth; to which defendant objected at the time, and, objection being overruled, defendant excepted.

Seventh. The court erred in admitting the witness Harvey Bohannon to state that he had been on the train when colored passengers were allowed to and did ride in the white people's coach, and in allowing said witness and R. D. Smith and this witness for the Commonwealth to testify as to the failure of defendant to furnish separate coaches with proper signs on other days than that charged in the indictment; to all of which defendant objected at the time, and the objection was overruled, to which defendant excepts.

P. J. FOREE,
Att'y for Def't.

14 "And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Oct. 4th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

The questions on motion for a new trial herein being considered by the court, the same is overruled; to which defendant, by attorney, excepts, and prays an appeal from the judgment herein to the court of appeals, which is granted upon condition that he lodge in the clerk's office of said court a transcript of the record in sixty days from the date of judgment.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

15 Shelby Circuit Court, September Term, Oct. 4th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Order.

Came defendant, by attorney, and tendered and filed *his* "bill of exceptions" herein, which was examined, approved, and signed by

the judge and is ordered to be made a part of the record herein without being spread on the order book.

"The 'bill of exceptions' referred to in the foregoing order is in words and figures as follows, to wit:"

16 Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Bill of Evidence.

Be it remembered that September 29th, 1898, on the trial of the cause in which The Commonwealth of Kentucky was plaintiff and Chesapeake and Ohio Railroad Company was defendant, before the Hon. William Carroll, judge, and a jury, in the Shelby circuit court, at the court-house, in Shelbyville, Kentucky, the following evidence was heard and the following proceedings were had:

The case being called for trial, a jury was examined, and selected, and accepted, and duly sworn by the clerk. The indictment was read to the jury; to which indictment the defendant plead not guilty.

It was then admitted by the attorney, Mr. P. J. Foree, for the defendant, and Mr. R. F. Peake, Commonwealth's attorney, that the Chesapeake & Ohio Railroad Company is a corporation doing business in this State and owning, managing, control-ing, and operating trains of passenger cars over railroad lines through Kentucky and through Shelby county, and was at the time charged in
17 this indictment such corporation, — was owning, managing, and controlling passenger coaches over the line of railroad in this county under a lease of right of trackage.

It is further agreed that all of the passenger cars that defendant thus operated through Kentucky are cars that came into Kentucky through another State.

It is agreed, this being a foreign corporation, that it has complied with the laws of Kentucky with reference to filing its articles of incorporation with the railroad commissioners and the secretary of state; that the trains run from Newport News, Virginia, to Louisville, Kentucky, and form a continuous line.

The plaintiff then introduced D. Ross SMITH as a witness in its behalf, who, having been first duly sworn, and examined by Mr. R. F. Peake, Commonwealth's attorney, testified as follows:

Q. Mr. Smith, where were you residing the twelve months previous to the 20th day of May, 1898?

A. In Shelby county.

Q. State whether or not during the twelve months preceeding the 20th day of May you were a passenger on the trains, known as the Chesapeake & Ohio train, operated by the Chesapeake & Ohio Railroad Company.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge;
18 to which ruling defendant excepts.

A. I was.

Q. How frequently during that time were you a passenger on said train, Mr. Smith?

A. I suppose, seven or eight times.

Q. State first what coaches comprised the train that you traveled on.

A. The sleeper and day coach, and then a coach in front of that. I suppose the baggage car.

Q. Now, behind the day coach was what?

A. Was the sleeper.

Q. In front of the day coach?

A. Baggage car.

Q. Anything else in front besides the baggage car? Do you know whether or not a smoker — there?

A. Do not. I have always gone on the coach next to the sleeper.

Q. State if you noticed any colored persons traveling in the coaches with white persons.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge; to which ruling defendant excepts.

A. Yes, sir.

Q. Can you say whether or not separate compartments were furnished by that railroad company on its coaches on which
19 you traveled for white and colored passengers, indicating the compartment that was set apart for each race by letters of sufficient size in places to be easily seen by passengers?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. No, sir; I have been on it several times, and I never noticed any there.

Q. What county were you traveling in at the time you failed to notice any separate compartment or letters indicating the compartment set apart for each race when colored passengers were in the car with white passengers?

A. That was in Jefferson county; I went down on the L. & N. and came back on the C. & O.

Q. Was that in Shelby county you noticed that condition of things?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. Yes, sir; I noticed it once or twice and didn't see anything of that kind.

Q. You were traveling in Shelby county between what points?
A. Between here and Louisville.

Cross-examined by Mr. J. P. FOREE, attorney for the defendant:

Q. You say you went into the coach next to the sleeper?
A. Yes, sir.
Q. Don't you know, as a matter of fact, the coach you say was the baggage car also had compartments in it?
A. No, sir; I didn't go in there, but no sign on the rear end of that coach.
Q. You don't know that coach was divided into compartments?
A. No, sir; never been in there.

Plaintiff then introduced HARVE BOHANNON as a witness in its behalf, who, being first duly sworn, and examined by Mr. R. F. Peake, Commonwealth's attorney, testified as follows:

Q. During the twelve months just preceding the 20th of May, 1898, were you or not a passenger on the Chesapeake & Ohio Railroad trains?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. I was a passenger on it during *it* last May; I believe it was during court.
Q. Was that the first day of the term?
A. I think it was.
Q. What were you attending court for at the May term, Mr. Bohannon?
A. I think I was a grand juryman.
Q. A member of the grand jury?
A. Yes, sir.
Q. Where did you travel to on the defendant's cars on that occasion; where from and to?
A. From Bagdad to Shelbyville.
Q. How frequently did you travel during that term of the court on that train, Mr. Bohannon?
A. I was several trips; I didn't remember how many.
Q. State whether or not colored passengers occupied the coach with white passengers.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge; to which ruling defendant excepted.

A. Yes; I saw colored persons in the coach with white persons.
Q. State whether or not there was separate compartments on that train for the travel of colored and white passengers, and indicating the separate compartment by letters and sign placed in a conspicuous place so they might be easily seen.
A. I saw none.

Q. Was your attention directed to that matter, Mr. Bohannon?

22 A. It was.

Q. After your attention was directed to that matter, state whether or not you made some inspection to see if such a sign was up.

A. I looked, but I saw no signs; no advertisements at all.

Cross-examined by Mr. P. J. FOREE, attorney for the defendant:

Q. You rode in the coach next to the sleeper, Mr. Bohannon?
A. I think so.
Q. There was a coach in front?
A. Yes, sir; there was a coach in front of me.
Q. That coach in front was divided into compartments?
A. I don't know that it was. I didn't go into it.
Q. You didn't go into that coach?
A. No, sir.

Redirect examination by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. Did you notice the coach in front of the one you were in and see the baggage car—one-half of it a baggage car and the other half a smoker?

A. No, sir; I didn't notice that.

23 Defendant, by its attorney, Mr. P. J. Foree, then moved the court to give it a peremptory instruction and instruct the jury to find for the defendant; to which motion the plaintiff objected. Objection overruled by Hon. Wm. Carroll, judge, and peremptory instructions refused; to which ruling the defendant excepted.

Defendant then introduced Capt. CARMICHAEL as a witness in its behalf, who, being first duly sworn, and examined by Mr. P. J. Foree, attorney for the defendant, testified as follows:

Q. What is your name?
A. J. R. Carmichael.
Q. Are you the conductor on one of the Chesapeake and Ohio trains?
A. I am.
Q. How long have you been a conductor for the Chesapeake and Ohio?
A. About twelve years.
Q. How long have you been on the train that runs through Shelby county?
A. I run one of the first ones; the Chesapeake & Ohio road came through Shelbyville.

24 Q. Are you familiar with the coaches that is run by the Chesapeake & Ohio through Shelby county?

A. I am.

Q. Tell the jury whether or not separate coaches have been furnished by the Chesapeake & Ohio Railroad Company—that is, coaches for the whites and blacks—during the twelve months previous to May 20th, 1898.

Question objected to by Mr. R. F. Peake, Commonwealth's attorney. Objection overruled by Hon. Wm. Carroll, judge; to which ruling Commonwealth's attorney excepted.

A. They have furnished separate coaches ever since I have been running down here, on all the trains I have run.

Q. Have they furnished signs to be posted up that indicated the race that the different coaches were set apart to?

A. They did.

Q. What size signs are they?

A. Well, I should judge about fourteen or sixteen inches long, with letters on them an inch across each way.

Q. What would these signs have on them?

A. For colored passengers, or for white passengers.

Q. Some signs had for white passengers and some for colored?

A. Yes, sir.

Q. What were done with these signs?

A. Hung up on the coaches to indicate which car set apart
25 for each race. We generally drove a tag up and hung them up.

Q. These signs plain large letters, so they could be read?

A. Yes, sir.

Q. Were you in charge on one of the trains on May 17th, 1898, from Newport News to Louisville, Kentucky—the morning train?

A. May 17th, 1898, I was running the train that runs west; took charge of it at Ashland.

Q. When are these signs put up?

A. Well, as a general thing, stay up pretty nearly all the time when they hadn't blown down or torn down by the passengers who might be drinking or something.

Q. You don't know about the signs when they get out of the State or as they are coming into the State?

A. No, sir.

Q. Did that train that you were in charge of on May 17th have separate coaches for the races?

A. I had four cars in the train—the first one was the baggage and express and mail car; the next one, #348, a compartment car; the next one was the coach, #346, used as a white car, and the sleeper car Cola.

Cross-examined by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. During the twelve months previous to the 20th of May, 1898, can you say to the jury that every train that passed through
26 Shelby county belonging to the defendant had the signs up indicating the compartment, or race, rather, for which it was intended?

A. No, sir; I cannot.

Q. Can you say that every time you took a train through Shelby county during that period that the signs were up?

A. No, sir; I cannot.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. You can say these signs were furnished and the coaches furnished?

A. Yes, sir; I have seen many a time passengers walk up to one of these doors and tear the sign down and throw it down in the corner, and then I would be some place where I couldn't have him arrested.

Recross-examination by Mr. R. F. PEAKE, Commonwealth's attorney:

—. During that period of time is it not a fact that the trains on which you were a conductor permitted colored passengers who boarded them in the State of Kentucky to travel to some other point in Kentucky; that these colored passengers were permitted to occupy the day coach of white passengers?

Question objected to by Mr. P. J. Foree, attorney for the de-
27 fendant. Objection sustained by Hon. Wm. Carroll, judge; to which ruling the Commonwealth's attorney excepted.

Q. Captain, do you have any specific recollection as to the 17th day of May, 1898?

A. No, sir; I have not.

Q. Can't say whether or not on that day your signs were up or not?

A. I couldn't say positively they were all up, but to the best of my knowledge certainly some of them — up.

Q. Did you have a sign on the white passengers' day coach?

A. To the best of my knowledge, I did.

Q. On each end?

A. I couldn't say, but generally the car did on the front end.

Q. Did you have a sign on that day for colored passengers?

A. To the best of my knowledge, I did.

Q. A while ago you said you couldn't state whether or not the signs were up?

A. I said I couldn't positively state that the signs were up that day.

Q. And you can't positively so state now?

A. No, sir; to the best of my knowledge, they were up.

28 Q. Where was the coach set apart for the colored passengers?

A. Between the mail and express car and the next car, which would be second car from the engine; that would be the one set apart for colored passengers.

Q. Now, isn't it a fact the baggage car—one end of the smoking car is used for a baggage car?

A. Not on that train that arrives in Louisville in the evening — has three cars; one is used for baggage, one for colored passengers.
Q. What is the next one?
A. For white passengers.
Q. What is the next one?
A. Sleeping car.
Q. Where is the smoking car?
A. Have none on that train.
Q. Is the colored car used for a smoker?
A. Not when any colored passengers in it.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. I understand from you this car is composed of a baggage-car compartment and another compartment which is set apart for the colored race?
A. Yes, sir.
29 Q. If they have any colored people do they permit white people to go in there and smoke?
A. Once in a while they do, when they have no colored people.

Defendant then introduced L. S. STUART as a witness in its behalf, who, being first duly sworn, and examined by Mr. P. J. FOREE, attorney for the defendant, testified as follows:

Q. Your name, I believe, is L. S. Stuart?
A. Yes, sir.
Q. What position do you hold with the Chesapeake and Ohio?
A. I am trainmaster between Louisville and Ashland.
Q. How long have you been trainmaster?
A. About eight years.
Q. Are you familiar with the trains that are operated by the Chesapeake & Ohio Railroad Company from Newport News, in Virginia, to Louisville, Kentucky?
A. Yes, sir.
Q. That have been operated twelve months previous to May the 20th, 1898?
A. Yes, sir.
Q. State whether or not the Chesapeake & Ohio during that twelve months at all times has furnished separate coaches.
A. Yes, sir.
30 Q. State whether or not these separate coaches had signs indicating in words or letters plainly the race that the coaches were set apart for.
A. Yes, sir; they have portable signs.
Q. What kind of signs are they?
A. Printed on card; the cards are about as wide as a car window; I suppose fourteen or fifteen inches long and two or three inches wide.
Q. What words would be on those signs?
A. Well, for white passengers on one card, and for colored passengers on another.

Q. The cards bearing the words white passengers, what coach — that intended for?

A. For white passengers.

Q. The one bearing the word for colored passengers?

A. For colored passengers.

Q. These signs furnished for all of the coaches operated prior to May 20th, 1898?

A. Yes, sir.

Q. Were separate coaches furnished during all of that time?

A. Yes, sir.

Q. That is, coaches for the white passengers and coaches for the colored passengers?

A. Yes, sir.

31 Q. All passenger trains operated during that time have such coaches?

A. Yes, sir; all regular trains.

Q. You mean by regular trains——

A. Scheduled trains—run on the same time every day.

Q. You mean trains carrying passengers?

A. Yes, sir.

Q. Your extras furnished to certain passengers have no such signs?

A. No, sir.

Q. Where these signs you furnished, were they such as could be easily read—plain?

A. Yes, sir.

Cross-examined by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. Were you on every train, on every trip that each train took during the year—twelve months just preceding May 20th, 1898?

A. No, sir.

Q. Do you mean to say these signs were up properly, at the proper places, on every train during that period?

A. No, sir; I couldn't say that.

Q. You mean to say, then, that the company at some point on its lines had such cards made and given to somebody else for the purpose of being put up?

32 A. They were furnished for that purpose. I have never been on any train that they were not up.

Q. You don't know that they were up on every train?

A. No, sir; couldn't swear to that.

Q. You never come through Shelby county on one of the trains during that period?

A. What period?

Q. The twelve months preceding the 20th day of May, 1898.

A. Yes, sir.

Q. Now every train through?

A. No, sir.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. Who furnished the conductor these signs indicating the race to which the coaches were set apart?
A. The railroad company furnished them.
Q. What was your duty as to them?
A. I carry them in stock, as all conductors' supplies, and they come to my office and draw them.
Q. Your place to see the coaches furnished?
A. Yes, sir.
Q. Were they furnished?
A. Yes, sir.

33 Upon the conclusion of the testimony the Commonwealth's attorney asked the court to give instruction "A," which is as follows: "The jury are instructed that if they believe from the evidence beyond a reasonable doubt that the defendant, The Chesapeake & Ohio Railroad Company, is a corporation doing business in this State and operating, owning, controlling, and managing lines of railroad through Shelby county, and running and managing and controlling passenger coaches and cars thereon, and within the twelve months before May 20th, 1898, failed to furnish separate coaches on cars for the travel or transportation of white and colored passengers, with each separate coach or compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart, they should find the defendant guilty and fix its fine at any sum not less than $500.00 nor more than $1,500.00.

If upon the entire case the jury have a reasonable doubt of the defendant having been proven guilty, they should find it not guilty.

Defendant objected to the giving of this instruction; his objections was overruled and said instruction given; to which he excepted at the time.

The defendant then moved the court to give instruction- Nos. 1 and 2, which are as follows:

34 *Instruction No.* 1.

The court instructs the jury that if they believe from the evidence that defendant furnished separate coaches or cars for the transportation of white and colored passengers, and signs for such coaches, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, they will find for defendant, although they may believe that negroes were permitted by the conductors to ride in coaches set apart for the whites, or the whites in the coaches set apart for the negroes.

Instruction 2.

The court instructs the jury that if they believe from the evidence that the defendant furnished separate coaches or compartment- of coaches for the travel or transportation of the white and colored passengers on its line of railroad through Shelby county, and signs, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, on May 20, 1898, and for the twelve months previous thereto, they will find for defendant, although they may believe that at times said signs were left down by the conductors or those in charge of the trains by inadvertence or were torn down by passengers.

To which the Commonwealth's attorney objected; his objection was overruled and both of said instructions given; to which he excepted at the time. The foregoing instructions are the only ones that were offered, given, or refused.

35 The Commonwealth's attorney, in his argument to the jury, told them that the defendant was trying to avoid observing the separate-coach law, but if they would bring in a verdict of guilty the railroad would see that the law was observed, and the wives and daughters of the jurors would not be compelled to ride in the same coach with noisy, greasy, dirty negroes; to all of which defendant objected at the time; but before the court could pass upon this objection the Commonwealth's attorney dropped this line of talk and returned to the facts, so that the objection was really never passed upon.

Then came defendant and tendered this his bill of exceptions; which having been examined by the judge, it is hereby certified that it contains all the evidence and is a true bill of exceptions, and is approved by the judge, and is ordered to be filed and made a part of the record without being spread upon the order book.

Witness my hand as judge of the Shelby circuit court, hereto set this October 4th, 1898.

WM. CARROLL, *Judge.*

36 "And afterwards the following schedule was filed, which is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Schedule.

The clerk of the Shelby circuit court is directed to copy the entire record in this case.

P. J. FOREE,
Attorney for Plaintiff.

Notice of filing the above schedule is accepted this October 15th, 1898.

R. L. PULLIAM,
County Attorney.

37 CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an appeal from a judgment of the Shelby circuit court rendered 29th day of September, 1898.

Whereas said appellant, Chesapeake & Ohio Railroad Company, an appeal from the judgment of the Shelby circuit court rendered at its September term, 1898, against it in favor of the appellee for the sum of five hundred ($500.00) dollars and the appellant desires to supersede the enforcement of the said judgment above mentioned:

Now, we, Chesapeake & Ohio Railroad Company, principal, and George B. Nelson, surety, do hereby covenant to and with the appellee, The Commonwealth of Kentucky, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of said judgment above stated in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the whole judgment aforesaid (and also pay all rents, hire, or damage which during the pendency of the appeal may accrue on any part of the property of which the appellee is kept out of possession by reason of the appeal).

Witness our hands this 27th day of October, 1898.

CHESAPEAKE & OHIO RAILROAD COMPANY,
By P. J. FOREE, *Attorney.*
GEO. B. NELSON,
By P. J. FOREE, *Att'y-in-fact.*

38 *Certificate.*

I, W. M. Cardwell, clerk of the Shelby circuit court, certify that the foregoing contains a full and complete transcript of the case of The Commonwealth of Kentucky *vs.* The Chesapeake & Ohio Railroad Company, as appears of record in my office.

Given under my hand as clerk of said court this 20th day of October, 1898.

W. M. CARDWELL,
Cl'k S. C. C.

Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 2d day of January, 1899, the following order was entered herein:

On motion of appellant, by counsel, this cause is set for oral argument on January 12, 1899.

Afterwards, on January 12, 1899, the following order was entered herein:

By consent this cause is passed to be heard on January 27, 1899.

39 Afterwards, on January 27, 1899, the following order was entered herein:

This cause coming on to be heard was argued by R. F. Peake for appellee and John T. Shelby for appellant and submitted.

Afterwards, on May 19, 1899, the following judgment was entered herein:

CHESAPEAKE & OHIO RAILROAD CO., Appellant, v. COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from Shelby Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, and that appellee recover of appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein expended.

On the same day, to wit, May 19, 1899, the court, through Judge White, delivered the following opinion herein:

CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant, vs. COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from Shelby Circuit Court.

40 The appellant, The Chesapeake & Ohio Railroad, was indicted and convicted in the Shelby circuit court for a failure to furnish separate coaches for both white and colored passengers, and failing to have each car bear in some conspicuous place appropriate words in plain letters indicating the race for which such car was intended. The fine assessed was the minimum fixed by statute, $500.00. From the judgment of conviction this appeal is prosecuted.

It is insisted that the indictment is defective in that it charges two offenses—one for failing to furnish cars and one for failing to designate by lettering the cars for white and colored persons.

It is also insisted that the separate-coach law is unconstitutional, as being a regulation of interstate commerce, which is exclusively within the powers of Congress, as given by the eighth section of the Federal Constitution.

It is also insisted that there is no evidence to support the charge in the indictment, and that the verdict should be therefore set aside.

We are of the opinion that the indictment charges but one offense, and that but one offense is designated in the statute. It may be committed by a failure to have separate coaches or by a failure, if more than one coach for passengers be in a train, to designate by lettering which coach is designated for white and which for colored passengers. It cannot be said that if appellant had in each passenger

train more than one coach for passengers it would then be
41 relieved from the duty of designating which of those cars were intended for the white and which for the colored race.

The statute makes it the duty to not only furnish separate cars for the races, but also to designate for which race each car is intended. A failure to observe these provisions is a violation of the law and subjects the offending party or company to the penalty prescribed. The validity of the statute has been before this court in the case of Ohio Val. R'y Rec'r *vs.* Lander, 47 S. W. Rep., 344 and 882, and it was there held that the act was not in violation of the Federal Constitution, either as to the commerce clause or the 14th amendment. The opinion of the court, page 344, by Mr. Justice Guffy is a clear statement of the law of this case, and is decisive of all questions here raised as to the validity of the act.

In the recent case of Lake Shore & M. S. R'y *v.* State of Ohio, decided by the Supreme Court of the U. S. February 20, 1899, in a decision by Mr. Justice Harlan, the doctrine of this court as announced in the Lander case was reaffirmed.

As to the contention that there should be a reversal of the judgment on account of the evidence, this cannot be done. The rule in criminal and penal cases is that if there be any testimony tending to prove the facts charged it will be upheld.

While the evidence in this case may not be as clear and convincing as might be desired, yet it cannot be said that there is an entire failure of any proof tending to show guilt. We perceive no prejudicial error in the admission of testimony. The argument of the prosecuting attorney is complained of, but there appears no
42 exceptions that will bring the matter before us for review.

There appears no error in the judgment, and the same is affirmed with damages.

Afterwards, on the 30th day of June, A. D. 1899, the appellant and plaintiff in error filed in the office of the clerk of the court of appeals its writ of error as follows (a copy of which is on file in said clerk's office):

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the court of appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the Commonwealth of Kentucky, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Kentucky and The Chesapeake & Ohio Railway Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under

said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of the Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Chesapeake & Ohio Railway Company, as by its complaint appears, we, being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and

44 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

THOS. SPEED,
Clerk U. S. Circuit Court, Ky. Dist.,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

45 On the same day, to wit, June 30, 1899, the plaintiff in error filed in said clerk's office its bond as follows:

Know all men by these presents that we, the Chesapeake & Ohio Railway Company, as principal, and G. B. Nelson, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the full and just sum of one thousand dollars ($1,000), to be paid to said Commonwealth; and to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this 30th day of June, 1899.

Whereas lately, at the April term, 1899, of the court of appeals of Kentucky, in a suit pending in said court between the said Chesapeake and Ohio Railway Company, as appellant, and The Commonwealth of Kentucky, as appellee, a judgment was rendered against the said party appellant, and the said party appellant hath obtained

and is prosecuting a writ of error to reverse the judgment aforesaid:

Now, the condition of the above obligation is such that if the said Chesapeake & Ohio Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By JNO. T. SHELBY, *Attorney.*
GEO. B. NELSON.

46 STATE OF KENTUCKY, }
Fayette County, } *sct:*

I, G. S. Shanklin, a notary public within and for Fayette county, Kentucky, certify that the foregoing instrument was this day produced to me, in said county and State, and was acknowledged by John T. Shelby for and on behalf of the Chesapeake & Ohio Railway Company to be its act and deed, and was also acknowledged by George B. Nelson, the surety mentioned therein, to be his act and deed.

Given under my hand and official seal this 30th day of June, 1899.

My commission as notary expires February 8th, 1902.

GEO. S. SHANKLIN,
Notary Public, Fayette County, Kentucky.

Approved by—
JAMES H. HAZELRIGG,
Chief Justice Ct. Appeals of Ky.

On the same day, to wit, June 30, 1899, the plaintiff in error filed in said clerk's office its assignment of errors as follows:

47 Supreme Court of the United States.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, *vs.* COMMONWEALTH OF KENTUCKY, Defendant in Error. } Assignment of Errors.

The Chesapeake & Ohio Railway Company, plaintiff in error in the above-entitled case, complains of the judgment rendered therein by the court of appeals of Kentucky, and for error therein assigns the following:

1. The said court of appeals erred in affirming the judgment of the Shelby circuit court, whereas it should have reversed the same, with directions to sustain the demurrer to the indictment.

2. The said court of appeals erred in holding that the statute of Kentucky commonly known as the "separate-coach act," being an act of the General Assembly of the Commonwealth of Kentucky

entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this State," approved May 24, 1892, was valid, whereas it should have held that the said statute was invalid and void, because in conflict with the following portions of the Constitution of the United States, to wit, with article I, section 8, subsection 3, relating to the regulation of commerce between the States, and with section 1 of the fourteenth amendment

Wherefore the said Chesapeake & Ohio Railway Company
48 prays that the said judgment of the court of appeals of Kentucky be reversed.

JNO. T. SHELBY,
Attorney for Plaintiff in Error.

49 COMMONWEALTH OF KENTUCKY, } *sct:*
Court of Appeals, }

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the preceding 48 pages contain a true and complete transcript of the record and proceedings had in said court in the case of Chesapeake & Ohio Railroad Company, appellant, against The Commonwealth of Kentucky, appellee, upon an appeal from a judgment of the Shelby circuit court, together with the writ of error, citation, copies of the bond, and assignment of errors, as the same appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 5th day of July, A. D. 1899.

Seal Kentucky Court of Appeals.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $13.00.

50 STATE OF KENTUCKY, } *sct:*
Court of Appeals, }

I, James H. Hazelrigg, chief justice of the court of appeals of Kentucky, hereby certify that Samuel J. Shackelford, who hath given the preceding certificate, is clerk of said court, and that his said attestation is in due form.

Given under my hand this 5th day of July, A. D. 1899.

JAMES H. HAZELRIGG,
Chief Justice Court of Appeals of Kentucky.

Endorsed on cover: File No., 17,470. Kentucky court of appeals. Term No., 356. The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 21, 1899.

No. 356. 103
Brf. of Wickham for P. C.
Office Supreme Court U.S.
FILED.
MAR 29 1900
JAMES H. McKENNEY,
CLERK.
Filed Mar. 29, 1900.

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 356.

The Chesapeake & Ohio Railway Company,

Plaintiff in Error,

VERSUS

The Commonwealth of Kentucky,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

1. A statute requiring railroad companies to furnish separate coaches for white and colored interstate passengers, and to transport such passengers of the two races in separate coaches, is invalid, as being in conflict with the commerce clause of the Constitution.
2. The Kentucky Separate Coach Act, properly construed, is applicable to the transportation of all passengers, whether interstate or intrastate, of the two races.
3. Said Act, if unconstitutional in its application to interstate passengers, can not be held valid for any purpose, but must be held invalid *in toto*.

JOHN T. SHELBY,
For Plaintiff in Error.

H. T. WICKHAM,
Of Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

SUPREME COURT OF THE UNITED STATES.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

VERSUS

THE COMMONWEALTH OF KENTUCKY, - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This Writ of Error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky, and the question it presents is whether the statute of that State, known as The Separate Coach Act, is unconstitutional, as being an attempt to regulate interstate commerce.

For the convenience of the Court this statute, which will be found in Kentucky Session Acts for 1891, '92, '93, page 63, is here copied in full:

"CHAPTER 40.

"AN ACT to regulate the travel or transportation of the white and colored passengers on the railroads of this State.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"§ 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad line or track

within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this Act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

"§ 2. That the railroad companies, person or persons, shall make no difference or discrimination in the quality, convenience, or accommodations in the cars or coaches or partitions set apart for white and colored passengers.

"§ 3. That any railroad company or companies that shall fail, refuse, or neglect to comply with the provisions of Sections 1 and 2 of this Act shall be deemed guilty of a misdemeanor, and, upon indictment and conviction thereof, shall be fined not less than five hundred nor more than one thousand five hundred dollars for each offense.

"§ 4. That all circuit courts in which railroads are operated in this State shall have complete jurisdiction over such offenses.

"§ 5. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment, and should any passenger refuse to occupy the car, coach, or compartment to which he or she may be assigned by the conductor or manager, said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off of the train. And for such refusal and putting off the train neither the manager, conductor, nor railroad company shall be liable for damages in any court.

"§ 6. That any conductor or manager on any railroad who shall fail or refuse to carry out the provisions of Section 5 of this Act, shall, upon conviction, be fined not less than fifty nor more than one hundred dollars for each offense.

"§ 7. The provisions of this Act shall not apply to employes of railroads, or persons employed as nurses, or officers in charge of prisoners.

"Approved May 24, 1892."

This Act will also be found in the publication known as Kentucky Statutes, and constitutes Sections 795–801 of that compilation.

The Chesapeake & Ohio Railway Company, Plaintiff in Error, a corporation foreign to the State of Kentucky and engaged in operating a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, and all of whose cars passing through Kentucky were, for the purposes of this case, engaged in interstate commerce (R. 8), was indicted in the Circuit Court of Shelby County for failing "to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on its line of railroad" (R. 2); and, being convicted in the Circuit Court, prosecuted an appeal to the Kentucky Court of Appeals, where the judgment of conviction was affirmed.

By demurrer to the indictment (R. 3–4), by a motion for a peremptory instruction at the conclusion of the testimony offered by the Commonwealth upon the trial (R. 11), and by motion in arrest of judgment, made pursuant to Sections 275–6 of the Kentucky Criminal Code of Practice (R. 6), the defendant below raised the question of the validity of the statute; which question was also argued in the Court of Appeals and there passed upon adversely to its contention (R. 19–20). This ruling of the State Court is assigned as error herein (R. 22).

ARGUMENT.

I.

Since the decision in *Hall* v. *DeCuir*, 95 U. S. 485, there can be no doubt that a State statute requiring the separation of interstate passengers of different colors would be a regulation of interstate commerce. In that case the Louisiana statute forbade common carriers to separate, on account of race or color, passengers carried by them while in their charge in that State, and authorized a recovery of exemplary as well as actual damages by any passenger who was thus separated without his or her consent; and the statute having been construed as intended to embrace interstate passengers, this Court held it to be an unconstitutional attempt to regulate interstate commerce, and denied the right of the plaintiff, who had been separated without his consent, to a recovery. The following language from the opinion is very pertinent to the case at bar:

> "But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, can not but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

> "It was to meet just such a case that the commercial clause in the Constitution was adopted. . . . The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce can not flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

The ruling in this case has never been modified or questioned, but, on the contrary, is constantly referred to with approval. Whatever difficulty may have been experienced in determining whether the principles upon which it is based were applicable to other cases arising under the commerce clause of the Constitution, there can be none as to their applicability to a statute either requiring or forbidding the separation by a carrier of interstate passengers. If, then, by the statute under consideration, it was intended to require that all passengers on railroads should, while within the territorial limits of Kentucky, be carried in separate coaches according to color, without reference to whether their journey lay wholly within the State or was partly within and partly without, it comes clearly under the decision in *Hall* v. *DeCuir*.

II.

We are, therefore, brought at once to the question of the proper construction of the Act.

It will be observed that there is no indication either in its title or body that its operation was intended to be confined to passengers whose journeys commence and end within the boundaries of the State. The title reads "An Act to regulate the travel or transportation of the white and colored passengers on the railroads of this State;" and thus, by its very words, manifests a purpose to regulate the travel or transportation on railroads of *all* white and colored passengers, while they are in the State, without reference to where their journey might commence or end. The body of the Act applies in terms to all companies or corporations operating railroads within this State, and to all conductors and managers of trains thus operated; requires the furnishing of separate coaches for *all* white and colored passengers, and makes it mandatory upon all such conductors and managers, under penalty of a fine, to assign to *each* white and colored passenger his or her respective car or compartment. Not only does the Act, therefore, both in its title and in its terms, embrace *all* white and colored passengers carried within the boundaries of the State, without reference to the initial point or the terminus of their journey, but it is manifest that the Legislature would never have imposed so useless a burden upon carriers as to require the separation of only such white and colored passengers as should commence and end their journey within the State. For it will be at once seen that if such separation can be constitutionally required only as to domestic travel, then the carrier can only be compelled to separate the colored intrastate passenger from the white intrastate passenger. He may with impunity carry together intrastate colored and interstate white passengers, or intra-

state white and interstate colored passengers, or interstate white and interstate colored passengers.

The legislation was evidently enacted with the purpose of enforcing one uniform policy of the separation of the two races in public vehicles of transportation within the limits of Kentucky, and to compel, under heavy penalties, not only the furnishing of separate means of transportation, but also the actual use of such separate means; and had it been contemplated that it was not within the power of the State to enforce this policy as to interstate passengers, we submit that it is affirmatively manifest that the policy would not have been adopted as to that portion of the travel which commenced and ended within the State lines. To hold otherwise would be to convict the law-making department of the absurdity of establishing a policy which would not be corrective of the supposed evils, except to a very limited extent, and which could only result in attrition, annoyance, and bad feeling by reason of the senseless, unintelligible distinction which would have to be made between interstate and domestic passengers of the colored race.

It will no doubt be strenuously insisted that this case should be ruled by L., N. O. & T. R. Co. v. State of Mississippi, 133 U. S. 587. A reference to that case will show, however, that this is not so. The question presented was as to the validity of the Separate Coach Act of Mississippi; but there the Supreme Court of the State had construed the statute *as applying solely to domestic commerce.* Referring to Hall v. DeCuir, and differentiating the question as there presented from the form it took in the Mississippi case, this Court said (pages 589 and 591):

> "The Supreme Court of the State of Louisiana held that the Act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This Court, accepting that construction as conclu-

> sive, held that the Act was a regulation of interstate commerce, and, therefore, beyond the power of the State. . . . In this case, the Supreme Court of Mississippi held that the statute applied solely to commerce within the State; and that construction, being the construction of the statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution."

In the case at bar the Court is not restrained in its construction of the Statute by the fact that the Kentucky Court of Appeals has ever construed it as intended to regulate domestic commerce, or, in other words, the transportation of intrastate passengers only. That Court, in its opinion in this case, says nothing on the point expressly; but, on the contrary, by basing its conclusion as to the validity of the Act (R. 20) upon its former decision in Ohio Valley R'y's Rec'r v. Lander, 47 S. W. Rep. 344 and 882, and the late case in this Court of Lake Shore, &c., R. Co. v. State of Ohio, 173 U. S. 285, it impliedly concedes that the Statute was intended to apply to interstate passengers, and was, therefore, to be upheld as a police regulation only incidentally affecting interstate commerce.

A reference to these two last-mentioned cases will make this appear very plainly. In Ohio Valley R'y's Receiver v. Lander, the opinion of the Court, delivered by Judge Guffy, will be found in 47 S. W. Rep. 344, and two separate opinions of Judges Burnam and DuRelle on page 882 of the same volume. It will be seen from all three opinions that almost the only question considered by the Court was the validity of this Act under the Fourteenth Amendment of the Constitution. Judges Burnam and DuRelle consider it wholly from this point of view, and Judge Guffy's opinion is devoted almost exclusively to this point. The only allusion by him to the interstate commerce

question is at the close of the opinion (page 351), where he seems to treat it as one concluded by the decision in L., N. O. & T. R'y v. State of Mississippi, *supra*, and then proceeds to say:

> "If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and, therefore, it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State."

From this quotation it is manifest that the learned Judge, speaking for the Court, did not consider that the statute would be unconstitutional if intended to apply to interstate passengers, and, from the concluding sentence, that it was regarded as applicable to the case of passengers *received* in the State, no matter what their destination. In other words, the Court assumed after its conclusion upon the Fourteenth Amendment question, that the power existed to regulate the transportation of all classes of passengers, so long as they were "within the jurisdiction of the State,"—a position wholly irreconcilable with the rule in Hall v. DeCuir, *supra*, and Wabash, St. L., etc., R'y v. Illinois, 118 U. S. 557.

Turning now to the other case referred to by the Court of Appeals in support of its opinion—Lake Shore, etc., R. Co. v. Ohio—the very citation of it shows that the learned Court regarded the statute in the aspect of a police regulation only incidentally affecting interstate commerce, and, therefore, in the absence of Congressional action, valid, without reference to its applicability to interstate passengers. For in the Ohio case the only subject discussed by this Court was the extent to which police regulations might constitutionally be made to affect what

was conceded to be interstate commerce; and the opinion, expressly recognizing the soundness of the ruling established in Hall v. DeCuir, with regard to either the enforced mingling or separation of interstate passengers, distinguishes the question there presented from the one then under consideration.

It is, therefore, confidently submitted (1) that this Act can be rationally construed only as intended to apply to *all* passengers while being transported within the jurisdictional limits of Kentucky; (2) that this Court is not precluded from adopting this rational construction by any contrary construction given by the highest court of Kentucky; and (3) that so construed it must, under the decision in Hall v. DeCuir and Wabash, St. L., etc., R'y. v. Illinois, *supra*, be pronounced unconstitutional.

III.

If it be contended that, although the State may not have the power to regulate how *interstate* passengers shall be carried, yet, as it has the power to regulate the carriage of *intrastate* passengers, the Act may, therefore, yet be held constitutional in its application to the other class—we submit that the statute can not, as to its constitutional and unconstitutional application, be thus separated by the Court. To do this would be not to construe and enforce the statute, but to make one different from that enacted by the legislative department of the State; it would be to make a statute which was evidently intended by the legislature to apply to all white and colored passengers, when within the limits of the State, apply only to a portion of such passengers, when there is nothing within the act to indicate that it was the legislative intent that it should be made applicable to a portion if it could not be properly applied to all. In support of this contention I ask a consideration of the following decisions:

In the Vriginia Coupon Cases, 114 U. S. 305, the court in holding that the whole act of the Virginia Legislature was un-

constitutional, laid stress upon the fact that the scheme was an indivisible one, not capable of being separated into parts, and that it must, therefore, stand or fall together, and said that those instances where one part of a statute might be enforced as constitutional and another declared to be inoperative and void were cases

> "Where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare *that the intention of the legislature was that the part pronounced valid should be enforcible, even if the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature, one they may never have been willing by itself to enact.*"

So in this case we contend that the statute being unconstitutional as to interstate passengers, and it being evident that the legislature intended the policy embodied in it to apply to both interstate and intrastate passengers, to hold that it is valid as to the one class only would be "to substitute for the law intended by the legislature, one they may never have been willing by itself to enact."

In United States v. Reese, 92 U. S. 214, two inspectors of a municipal election in Kentucky were indicted under a Federal statute which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who, by unlawful means, hindered or delayed any citizen in doing an act required to be done in order to qualify him to vote, or from voting at any election. There being nothing in the statute to limit its operation to a refusal or hindrance "on account of the race, color, or previous condition of servitude of the voter," it was held to be unconstitutional, because, on its face, it was broad enough to cover wrongful acts without, as well as within, the constitutional power of Congress. An

attempt was made in that case to limit the statute by construction so as to make it applicable only to those acts which Congress might rightfully prohibit and punish, but to this contention the Court replied (page 221):

> "For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. *The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.* It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the Trade-Mark Cases, 100 U. S. 82, the court said (page 98) that the purpose of the statute there under consideration

> "was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries, which extended no such privileges to us, were excluded from them here,"

and it was held that a statute so broad and comprehensive in its terms was not within the constitutional grant of legislative power to Congress. It was suggested, however, that the indictment

there presented a case in which the defendant was charged with having in his possession counterfeits of the trade-marks of foreign manufacturers; and that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several States, the statute in question might be held valid in that class of cases, even if no further. The Court, however, said as to this suggestion (page 98):

> "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part when they are distinctly separable, so that each can stand alone; it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And again (page 99):

> "If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, viz., to make a trade-mark law which is only partial in its application, and which would complicate the rights which parties would hold in some instances under the act of Congress, and, in others, under the State laws."

It will be observed how singularly pertinent the last quotation is to the question which is involved here, where, in order to hold that the statute under consideration may be constitutionally applied to the case of intrastate passengers and intrastate commerce, the Court would have to make a Separate Coach law "which is only partial in its application."

In Baldwin v. Franks, 120 U. S. 678, Baldwin had been indicted under a Federal statute which provided that if two or more persons in any State or Territory should conspire for the purpose of depriving any person or class of persons of the

equal protection of the law, or of equal privileges or immunities under the law, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law, they should be punished by fine or imprisonment. The alleged offense was committed by the plaintiff against the Chinese in the State of California, and, being arrested, he applied for his discharge on a writ of *habeas corpus*, upon the ground that the statute in question was not within the legislative power of Congress; the words of the statute being so comprehensive as to include not only cases of conspiracy to deprive persons of their rights under the laws of the United States, but also conspiracies to deprive persons of their rights under any State law as well. It was contended, however, upon the part of the Government, that, although the statute was invalid so far as it applied to conspiracies to deprive persons of the protection to which they were entitled under the laws of the State, it was yet good for the punishment of those who conspired to deprive aliens of the rights guaranteed to them in the State *by the treaties of the United States;* it being within the constitutional power of Congress to punish conspiracies in the last named class of cases. To this argument, however, the Supreme Court replied as follows (page 685):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though

not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

We submit that the four cases above referred to are decisive of this point. The Separate Coach Law is certainly as broad, general, and comprehensive in its terms as any of the acts referred to in any of these cases; and it does by its terms embrace just as unequivocally as they did a class of subjects, viz: interstate passenger commerce, which was not within the legislative power of the body which enacted the law. And just as manifestly here, as in them, is the suggestion, that the statute may still be upheld as to the class of subjects to which the legislative body might constitutionally apply its policy, met by the principle that the courts can not undertake to sever statutes which in their purpose and essence are inseverable and designed to establish a uniform system and effectuate a uniform policy. The object which this statute, as we have before said, evidently sought to accomplish was that all passenger traffic within the State of Kentucky, and without reference to whether it originated within or without the State, should be conducted upon the uniform policy of a separation of the two races. For the court to hold that, while this policy can not be constitutionally carried out with reference to interstate passengers, it should yet be applied to intrastate transportation, would be to decide that the legislature intended it to

apply to the limited class, even if it could not apply to all. We submit that there can nowhere be found the evidence of any such intention; that the statute is, therefore, an inseparable one, and must fail by reason of its attempt to extend the legislative power of the State to subjects which are within the legislative power of the United States only.

Each of the foregoing propositions was considered by the Circuit Court of the United States for the District of Kentucky in the case of Anderson v. L. & N. R. R. Co., 62 Fed. Rep. 46, and in the opinion rendered by Judge Barr in that case the conclusions which we have above endeavored to establish were reached. When that opinion was delivered, neither the case at bar nor that of Ohio Valley R'y's Rec'r v. Lander had been decided by the Kentucky Court of Appeals; but as we have endeavored to show, in neither was the statute in question construed as applicable only to the transportation of domestic passengers. The opinion in Anderson v. L. & N. R. R. Co. is referred to as furnishing a clear and satisfactory construction of the statute, and an able and succinct exposition of the law applicable to this case.

I respectfully ask a reversal of the judgment of the Court of Appeals of Kentucky.

JOHN T. SHELBY,
For Plaintiff in Error.

HENRY T. WICKHAM,
Of Counsel.

CITATIONS.

Kentucky Session Acts 1891–'92–'93, page 63;
Hall v. DeCuir, 95 U. S. 485;
Wabash, St. L., etc., R'y v. Illinois, 118 *Id.* 557;
L., N. O. & T. R. Co. v. Mississippi, 133 *Id.* 587;
Ohio Valley R'y's Receiver v. Lander, 47 S. W. Rep. 344 and 882;
Lake Shore, etc., R. Co. v. Ohio, 173 U. S. 285;
Virginia Coupon Cases, 114 *Id.* 305;
U. S. v. Reese, 92 *Id.* 214;
Trade Mark Cases, 100 *Id.* 82;
Baldwin v. Franks, 120 *Id.* 678;
Anderson v. L. & N. R. R. Co., 62 Fed. Rep. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 103.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

Opinion of Court of Appeals of Kentucky in Case of Ohio Val. R'y's Receiver vs. Lander et al.

(COURT OF APPEALS OF KENTUCKY, OCT. 7, 1898.)

OHIO VAL. R'Y'S RECEIVER
vs.
LANDER ET AL.

CONSTITUTIONAL LAW—DISCRIMINATION AGAINST COLORED RACE—SEPARATE-COACH LAW—CONSTRUCTION OF STATUTE SO AS TO UPHOLD IT.

1. Though not authorized or required by statute to do so, railroad companies may make reasonable regulations for the separation of white and colored passengers.
2. Act 1892, known as the "Separate-coach law," requiring railroad companies to assign white and colored passengers to separate coaches, is not in violation of the 14th amendment to the Constitution of the United States.

3. If the statute be a regulation of interstate commerce if applied to interstate passengers, which is not conceded, it will be construed as intended to apply only to transportation within the State.

Appeal from Circuit Court, Christian County.

"To be officially reported."

Action by Robert N. Lander and Fannie E. Lander against John McLeod, receiver of the Ohio Valley railway, to recover damages.

Verdict and judgment for plaintiffs, and defendant appeals. Reversed.

Fairleigh & Straus and Hunter Wood, for appellant.

John Feland & Son, for appellees.

GUFFY, *J.*:

This action was instituted by the plaintiffs, Robert N. Lander and Fannie E. Lander, his wife, against John McLeod, receiver of the Ohio Valley railway. It is alleged in the petition that the plaintiffs are husband and wife, and citizens of Hopkinsville, Ky., and that they are colored people and citizens of the United States. It is further alleged that said railway was in the possession and under the control of said McLeod, as receiver aforesaid, and that said McLeod, through his agents, etc., has been and is operating it as a common carrier, and said railway extends from the city of Evansville, Ind., through the cities of Henderson and Princeton, to Hopkinsville, Ky., and is an interstate carrier of passengers and freight between said points, and is so operated by McLeod, receiver; that on or about the 24th of July, 1895, the plaintiffs pur-

chased from the agent of said McLeod a first-class passenger ticket for the female plaintiff, entitling her to ride on said railway and connecting line from Hopkinsville, by way of Princeton, to Mayfield, Ky., in any first-class coach of any passenger train running between said points, and with said ticket in her possession she boarded the regular passenger train of defendant, which was then about to leave said station, and entered what is usually called the "ladies' coach," and took a seat therein which was not at the time occupied or claimed by any other person, and, while thus seated and waiting for the train to start, the conductor thereof in charge of said train came to her, and, without demanding of her her ticket or making any explanation of his conduct, required her to give up her seat and leave said coach and occupy a seat in the front coach, usually called the "smoker," in a small compartment in front thereof, or get off of the train; that it was very warm weather and the compartment to which she was thus assigned was small and illy ventilated, and that it was unclean and equipped and fitted with accommodations greatly inferior to the ladies' coach from which she was thus ordered by the said conductor, and was occupied by colored passengers of all classes, sexes, and conditions, and persons were allowed to smoke and indulge in other practices, without restraint therein, offensive to ladies and children, and which were not permitted in said ladies' coach; that she refused to give up her said seat and asserted her right as holder of a first-class ticket to remain where she was; that said conductor went into another coach or part of said train, and came back with two or three other men, who were also agents of defendant, and, upon her persisting in retaining her seat,

said conductor took hold of her by the arms and shoved her up from it, and was proceeding by force of arms to remove her from said coach, and plaintiff, in order to avoid a physical struggle with said employés and prevent a breach of the peace, yielded, under protest, to the commands of said conductor, and consented to go into said car rather than give up her trip by being removed from the train, and she was thus compelled to occupy a seat in said car until said train reached Princeton, the end of her journey on that road; that after she had gone into said compartment the conductor demanded of her her ticket, which she gave up to him; that plaintiff, Fannie E. Lander, is a lady of good character and reputation, and that she was not at the time interrupting or in any way disturbing or interfering with anybody, and by this violent and illegal conduct of the conductor and other employés of the defendant, these plaintiffs have been damaged in the sum of $10,000, for which they prayed judgment.

The defendant filed a demurrer to said petition.

The answer of the defendant is as follows: The defendant, for answer to the petition herein, denies that while plaintiff, Fannie E. Lander, was seated in one of its passenger cars and waiting for the train to start, the conductor in charge of this defendant's car came to her and, without demanding her ticket or making any explanation to her of his conduct, required that she should give up her seat and leave said coach or occupy a seat in the front coach, usually called the "smoker," or in a small compartment in the front part thereof, or to get off of the train. He denies that the compartment to which the plaintiff was invited to take a seat was small or illy ventilated, or that it was unclean or un-

fitted or equipped with accommodations greatly or at all inferior to those of the coach in which plaintiff was seated at the time she was requested to go into another coach, or that said compartment was occupied by persons who were unfit to be in said compartment, or indulged in any practice or practices, without restraint therein, offensive to ladies and children, which were not permitted in the coach which plaintiff was invited to leave. He denies that when plaintiff was requested to leave the coach that she was in she refused to give up her said seat or to leave said coach, or that she asserted any right, as the holder of a first-class ticket, to remain where she was when said conductor requested her to leave said coach, and he denies that said conductor went into another coach or a part of the said train, or came back into the coach where plaintiff was with two or three other men or any other men, who were agents or not agents of this defendant, and that, upon her persisting and retaining said seat, the said conductor took hold of her by the arms, or shoved her up from the seat, or was proceeding by force of arms to remove her from said coach, or that plaintiff, in order to avoid a physical struggle with said conductor or persons, or to prevent a breach of the peace, yielded under protest to the commands of the said conductor, or consented under protest to go into said compartment in order to avoid being removed from said train, or to avoid giving up her said trip, or that she was thus compelled or forced to occupy a seat in said compartment until said train reached Princeton, the end of defendant's road. He denies that by reason of any illegal or violent conduct by the conductor in charge of said train or any other employé upon said train the plaintiff was greatly or at all damaged in the sum of $10,000 or

any other sum. The defendant, for further answer, says that the plaintiff bought a ticket at Hopkinsville, Ky., to Mayfield, Ky., and started to board one of defendant's trains at Hopkinsville, Ky., and when she made an effort to board said train the brakeman in charge of said train and under the employment of this defendant was standing at the steps of the coach, where it was his duty to stand, and there informed the plaintiff before she got into any coach to go into the colored coach, the apartment set apart for colored people, as required by the laws of this State. The plaintiff refused to do this, and went to the white coach. The conductor thereupon went into the white coach, and politely informed the plaintiff of the law of this State providing for separate coaches for colored and white passengers, and politely requested her to obey the law and to go into the compartment provided for colored people, and took the plaintiff's basket or baggage and carried it into the colored compartment for her and requested her to go into said car. The plaintiff, without being forced in any way and without any force being used upon her in any way, consented to go into said coach, and did go into said coach. The conductor did not take hold of the plaintiff and did not force her from her seat by any violence whatever, but, after explaining to her about the law and the requirements of the law, the plaintiff voluntarily, in company with her husband, left the white coach and went into the coach provided for the colored people. No insulting language was used by the conductor or any other employé of the train to the plaintiff, and she was not in any way mistreated or offended by any misconduct upon the part of the conductor of said train or any other employé connected with

the operation of said train. The defendant further states that the compartment provided on said train for the colored passengers was in every way as comfortable, as clean, and as free from offensive misconduct on the part of the passengers as the coach provided for first-class white passengers. Said coach was well ventilated and was as well provided and equipped in every respect for the comfort of colored passengers as the coach in which the plaintiff was at the time she was invited to go into the colored compartment. No smoking was allowed in said compartment, and no disorderly conduct or offensive or disorderly characters were permitted to ride in said coach, but the same was as well conducted in every respect and as well policed in every respect as the coach which plaintiff was invited to leave. The defendant says that these separate coaches are provided by virtue of a law passed by the Kentucky legislature, and that he has obeyed said law and requires all of his agents in the operation of his road to obey it, and it is the duty of every passenger, white or black, to obey it, and nothing was done on this occasion except to request the plaintiff to obey the law, which she did, and she was not compelled to do so by any violence used by the conductor or any other agent towards her. Having fully answered, defendant prays to be dismissed and for his costs herein expended.

The reply is a traverse of the affirmative matters of the answer, and the affirmative averments of the reply were, by agreement, controverted of record.

A jury trial resulted in a verdict and judgment in favor of plaintiffs for $125, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The grounds relied on for a new trial are: (1) Because the court

erred in giving instruction No. 1 asked for by plaintiff: (2) because the court erred in refusing to give instructions Nos. 2, 3, and 4 asked by appellant; (3) because the verdict is contrary to the law and the evidenee.

The instruction given by the court is as follows: "The court instructs the jury that, under the law and the evidence in this case, the plaintiff had the right to take a seat where she did, in the ladies' coach, and that any attempt on the part of the defendant, his agents or employés, in charge of the train, to make her move into and take a seat in another coach was a violation of law and of her rights; and, if she was required by any conductor or any agent or servant of the defendant so to remove, the jury must find for plaintiffs the damages they have sustained; and in so finding they are not confined to actual damages, but may take into consideration the humiliation and injury to the feelings of the plaintiff, and the nature and condition of the compartment which she was required to occupy, and find in any sum not exceeding the amount claimed in the petition."

The defendant asked the three following instructions, which were refused by the court:

"(1.) If the jury believe from the evidence that the plaintiff got into the ladies' coach in defendant's car at Hopkinsville, Ky., and was invited, in a polite and courteous way, by the conductor of said car, to leave the same, and go into the compartment prepared for colored passengers, and they believe from the evidence, further, that said compartment prepared for colored passengers was substantially as comfortable in all of its appointments as the car from which she was invited to leave, and they further believe from the evidence that the conductor was not guilty of any misconduct

towards the plaintiff, and used no more force than was necessary to compel a compliance with his request, then the law is for the defendant, and the jury should so find.

"(2.) The court instructs the jury that it was the duty of the defendant to provide separate coaches for colored and white passengers, and it was the duty of the defendant, through its agents, officers, or employés, to compel colored passengers and white passengers to occupy the respective compartments prepared for them, and it was the duty of the plaintiff to obey this regulation of the company; and if the jury believe from the evidence that the defendant was in good faith at the time enforcing the regulation, and using no more force than was necessary to compel the plaintiff to conform to this regulation, then the law is for the defendant, and they should so find.

"(3.) The court instructs the jury that, in the event they should find for plaintiff, they can only find compensatory damages—that is, such damages as would actually compensate her for any injury done to her, including any mental anguish or mortification to her feelings resulting by reason of the conduct of defendant's agents and employés in compelling her to leave the ladies' coach and go into the colored compartment."

It will be readily conceded that it was the duty of the appellant to furnish the appellee a seat in a coach as good and comfortable as the others used, or set apart for the accaccommodation of first-class white passengers, and also that appellant would not be justifiable in using unnecessary force in requiring plaintiff to occupy the coach set apart for colored passengers; and, while there is some conflict in the proof in this respect, the chief, if not

the sole, question discussed in the briefs on file is the constitutionality or validity of an act of the legislature of 1892, commonly called "the separate-coach bill." It is, however, suggested by appellant that in the absence of any statutory enactment the appellant company had the right to adopt and enforce rules and regulations requiring colored persons and white persons to occupy separate coaches.

The supreme court of North Carolina in Britton *vs.* Railway Co., 88 N. C., 542, used the following language: "Equally well settled does it seem to be, both upon principle and authority, that among those reasonable regulations which they have a right to adopt is the one of classifying their passengers and assigning them to separate, though not unequal, accommodations. This right, as regards the separation of the white and colored races in public places, has been expressly and fully recognized in many of the courts, both State and national [quoting Railroad Co. *vs.* Miles, 55 Pa. St., 209; Day *vs.* Owen, 5 Mich., 520; Hall *vs.* De Cuir, 95 U. S., 485]. In some of the cases it is said to be not barely a right appertaining to the carrier, but a positive duty, whenever its exercise may be necessary in order to prevent contacts or collisions arising from natural or well-known antipathies, such as are likely to lead to disturbances from promiscuous intermingling."

The supreme court of Illinois in Railway Co. *vs.* Williams, 55 Ill., 187, said: "It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers traveling on their line of road. It is not only their right, but their duty, to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be estab-

lished and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers."

In discussing the question under consideration the supreme court of Tennessee, in Railroad Co. *vs.* Wells, 85 Tenn., 615, 4 S. W., 5, said: "We know of no rule that requires railroad companies to yield to the disposition of passengers to arbitrarily determine as to the coach in which they take passage."

The case of Day *vs.* Owen, reported in 5 Mich., 525, was an action to recover damages against a defendant because of his refusal to allow Day, a colored man, to take cabin passage in defendant's boat from Detroit to Toledo. One of the defenses interposed was that by the regulations and established course of the business of the steamboat men, colored persons were not received as cabin passengers and were not allowed to use the cabin as such passengers, and said regulation and course of business was averred to be reasonable. The court in that case said:

"The refusal to allow plaintiff the privilege of the cabin, on his tendering cabin fare, was nothing more or less than denying him certain accommodations while being transported, from which he was excluded by the rules and regulations of the boat. The rules and regulations must be reasonable, and, to be so, they should have for their object the accommodation of the passengers. * * * As the duty of carriers is imposed by law for the convenience of the community at large, and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the

accommodation of particular individuals, to incommode the community at large."

The same principle is announced in Railroad Co. *vs.* Miles, 55 Pa. St., 209. To the same effect is the decision of Com. *vs.* Power, 7 Metc. (Mass.), 596.

In Murphy *vs.* Railroad Co., 23 Fed., 637, Judge Key, in his charge to the jury, said: "Again, I believe that, where the races are numerous, a railroad may set apart certain cars to be occupied by white people, and certain other cars to be occupied by colored people, so as to avoid complaint and friction; but, if the railroad charge the same fare to each race, it must furnish 'substantially like and equal accommodations." It, however, appears in the case *supra* that the railroad did not furnish equal accommodations, and the colored man was allowed to recover.

In the United States district court of Maryland, in the case of McGuinn *vs.* Forbes, 37 Fed., 639, the syllabus of the decision reads as follows: "Plaintiff, an educated colored clergyman, the holder of a first-class ticket on defendant's steamboat, when the supper bell rang seated himself at the table; and on the captain requesting him to move to another table, because the other passengers had complained of his presence, he refused. The captain then had another table fixed up for the other passengers, and plaintiff was left alone, his supper being furnished him. Held, that there was no discrimination against plaintiff on which to base a libel for damages against the owner of the boat."

It was said in the case of Houck *vs.* Railway Co., in the United States circuit court for Texas, reported in 38 Fed., 226, in substance, that a railway company, in the management of its complicated interests, may be authorized in law,

on showing a proper or sufficient state of facts to establish, in the opinion of the court, the reasonableness of the rule, in setting apart one or more of its cars for the use exclusively of colored passengers, and a like number, more or less, as the services may require, for the use exclusively of white passengers; but whenever the company enforces such rule, the company is charged with the duty of furnishing to colored people who pay first-class fare cars to ride in that are as safe and comfortable in their conditions and appointments as the cars furnished to white passengers who pay first-class fare.

It will be seen from the authorities cited that the appellant was authorized to establish a rule requiring white passengers and colored passengers to occupy separate coaches; and whether the law relied on by appellant is constitutional or not, yet if it did adopt the requirements of the law as a rule, and the rule was reasonable, all passengers were legally bound to abide by the rule; and it may be safely assumed that such a rule in this State is a reasonable rule, and is not unjust, either to the white or colored people.

The important question presented for decision is whether or not the Kentucky statute requiring separate coaches or compartments for white and colored passengers is in violation of the Constitution of the United States or of this State. The statute in question is embraced in sections 795–801, inclusive, of the Kentucky statutes. The assumption by some colored persons and by some of the white race to the effect that the statute implies or assumes that the colored race is an inferior race is not well founded. It is well known that a large portion of the white race is opposed to being required to occupy the same seat or to travel in the same

coaches that are occupied by the colored race, and it is wholly immaterial whether the colored race shares the same feeling in that regard towards the white race or not, but the presumption is that many of them likewise prefer to occupy seats in coaches not occupied by white persons. But, whether this be true or not, it is manifestly better for the colored race to be separated from the white race than to be placed in the same coach with white persons, with the result that the same would be offensive to the white race; for, if this be true, it would reasonably cause disturbances, which would be alike disagreeable and injurious to both races. It seems to us that the law complained of is more necessary for the comfort, convenience, and protection of the colored race than of the white race; and it is to be regretted that the law has not been accepted by both races as designed and intended for the mutual benefit, convenience, and protection of both races. So far as we are advised, the constitutionality of the statute in question has not been directly passed on by this court, but its validity has been recognized in several decisions of this court.

In the case of Quinn *vs.* Railroad Co., 32 S. W., 742, the court had under consideration the claim of appellant, who was a colored lady, for damages against the appellee, based upon the allegation that the appellee permitted a white person to go in and remain in the car assigned to colored passengers, and which was occupied by her, and while such person was permitted to remain there he used obscene and profane language, thus humiliating and injuring appellant. This court held that she had a cause of action, and reversed the judgment of the lower court on account of error of instructions, the instructions not being sufficiently explicit as to the right of

the party to recover. In Louisville & N. R. Co. *vs.* Com. (Ky.), 37 S. W., 79, the court again recognized the validity of the law, and to the same effect is the case of Bailey *vs.* Railroad Co. (Ky.), 44 S. W., 105. It seems clear, therefore, that this court has heretofore regarded the statute as valid, and, upon due deliberation, we are of the opinion now that the statute in question is not in conflict with the Constitution of the United States, nor with the constitution of this State, and we are not aware of any decision of the Supreme Court of the United States that holds the statute in question to be invalid.

The statute of Mississippi of March 2, 1888, required all railroads carrying passengers in that State to provide equal and separate accommodations to the white and colored races. It also provided that all railroad companies that shall refuse or neglect within 60 days after the approval of the act to comply with the requirements should be deemed guilty of a misdemeanor, and, upon conviction, fined not more than $500. The Louisville, New Orleans and Texas Railway Company was indicted and fined in the court of Mississippi for failure to comply with the law in question, and, the judgment of the lower court having been affirmed by the supreme court of Mississippi, appellant appealed to the Supreme Court of the United States, which court affirmed the judgment of the Mississippi court. In discussing the question, the court said (Louisville, N. O. & T. R'y Co. *vs.* Mississippi, 133 U. S., 587; 10 Sup. Ct., 348): "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may

cause an extra expense to the railroad company: but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State. No question arises, under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That, affecting only commerce within the State, is no invasion of the powers given to Congress by the commerce clause. In the case of Wabash, St. L. & P. R'y Co. *vs.* Illinois, 118 U. S., 557; 7 Sup. Ct., 4, Mr. Justice Miller, speaking for the court, said: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begin and end within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among

the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision; and the distinction between commerce among the States and the other class of commerce, between the citizens of a single State and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other [quoting The Daniel Ball, 10 Wall., 557; Hall *vs.* De Cuir, 95 U. S., 485; Telegraph Co. *vs.* Texas, 105 U. S., 460].' The statute in this case, as settled by the supreme court of the State of Mississippi, affects only such commerce within the State, and comes, therefore, within the principles thus laid down. It comes also within the opinion of this court in the case of Stone *vs.* Trust Co., 116 U. S. 307; 6 Sup. Ct., 334, 388, 1191."

It will be seen that the appellee in the case at bar purchased a ticket from Hopkinsville to Mayfield, the entire trip being within the State of Kentucky; and, moreover, it appears that she would leave the appellant's road at Princeton, Ky., and there board another train for Mayfield, her destination. It therefore seems clear to us that the decision of the supreme court, *supra*, is conclusive of the constitutionality of the act in question, so far as appellees in this case are concerned. It is true that the appellant railroad extends to Evansville, in the State of Indiana, but that fact can in no wise render the statute in question invalid as to the duty of the railroad to respect and enforce the statute in question.

We have also been referred to the case of Plessy *vs.* Fergu-

son, decided by the Supreme Court of the United States, May, 1896, reported in 163 U. S., 537; 16 Sup. Ct., 1138. We quote as follows from the opinion of the court in that case: "This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races (Acts 1890, No. 111, p. 152). The first section of the statute enacts 'that all railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons shall be admitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to.' By the second section it was enacted 'that the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State.' The third section provides penal-

ties for the refusal or neglect of the officers, directors, conductors, and employés of railway companies to comply with the act, with a proviso that 'nothing in this act shall be construed as applying to nurses attending children of the other race.' The fourth section is immaterial. The information filed in the criminal district court charged, in substance, that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred. The petition for the writ of prohibition averred that petitioner was seven-eighths Caucasian and one-eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race; and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act. The constitutionality of this act is attacked upon the ground that it conflicts both with the thirteenth amendment of the Constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the States. That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servi-

tude except as a punishment for crime, is too clear for argument. * * * By the fourteenth amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. The proper construction of this amendment was first called to the attention of this court in Slaughter-house cases, 16 Wall., 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said, generally, that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States. The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law; but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within

the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power, even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. * * * It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action or of inheritance is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man. In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the State legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street

is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. * * * So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes, or even requires, the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of State legislatures. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State legislature, and should enact

a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People *vs.* Gallagher, 93 N. Y., 438, 448: 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon which they are designed to operate. When the Government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some

holding that any visible admixture of black blood stamps the person as belonging to the colored race (State *vs.* Chavers, 50 N. C., 11); others that it depends upon the preponderance of blood (Gray *vs.* State, 4 Ohio, 354; Monroe *vs.* Collins, 17 Ohio St., 665); and still others that the preponderance of white blood must only be in the proportion of three-fourths (People *vs.* Dean, 14 Mich., 406; Jones *vs.* Com., 80 Va., 538). But these are questions to be determined under the laws of each State, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. The judgment of the court below is therefore affirmed."

It seems to us that the foregoing decision conclusively settles that it was the duty of the appellant to assign to the appellee a coach separate from a coach set apart for white persons. It may be true that the railroad under consideration in the case *supra* commenced and ended in the State of Louisiana, but we do not think that the court was at all governed in its conclusion by that fact.

It is insisted for appellee that the act under consideration undertakes to regulate or control as to interstate passengers, and that that portion of the statute is invalid, as being in conflict with the interstate-commerce clause of the United States Constitution, and that the act is inseparable, and therefore it must all be held invalid. We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision, hereinbefore referred to, of the Supreme Court of the United States in the case of Louisville, N. O. & T. R'y Co. *vs.* Mississippi, 133 U. S., 587; 10

Sup. Ct., 348, and also in conflict with the well-settled rules of construction. If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and therefore it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State and railroad companies receiving passengers in this State are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State.

It results from the foregoing that the court erred in giving instruction No. 1, and also erred in refusing the instructions asked for by appellant. Judgment appealed from is therefore reversed and cause remanded for a new trial, upon principles consistent with this opinion.

Supreme Court of the United States.

No. 103.—October Term, 1900.

The Chesapeake and Ohio Railway Company, Plaintiff in Error, vs. The Commonwealth of Kentucky.	In error to the Court of Appeals of the Commonwealth of Kentucky.

[December 3, 1900.]

This was a writ of error to review the conviction of the Railway Company for failing to furnish separate coaches for the transportation of white and colored passengers on the line of its road, in compliance with a statute of Kentucky enacted in 1892, the first section of which reads as follows:

"§ 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad line or track within this State, and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

The second section requires such companies to make no difference or discrimination in the quality, convenience or accommodations in such coaches; and the fifth provides that conductors "shall have power, and are hereby required to assign to each white or colored passenger his or her respective car, or coach, or compartment, and should any passenger refuse to occupy the car, coach or compartment to which he or she might be assigned by the conductor or manager, the latter shall have the right to refuse to carry such passenger," and may put him off the train. The seventh section contains an exception of employees of railroads, or persons employed as nurses, or officers in charge of prisoners.

The indictment followed the language of the statute above quoted. The defendant demurred upon the ground that the law was repugnant to the

Constitution of the United States, in that it was a regulation of interstate commerce. The demurrer was overruled, and the case tried before a jury, which found the defendant guilty, and fixed its fine at five hundred dollars. The case was carried by appeal to the Court of Appeals, and the conviction affirmed. The court delivered a brief opinion to the effect that its judgment was concluded by the case of the *Ohio Valley Railways' Receiver* v. *Lander*, (47 S. W. Rep. 344.)

Mr. Justice BROWN delivered the opinion of the Court.

This case turns exclusively upon the question whether the separate coach law of Kentucky be an infringement upon the exclusive power of Congress to regulate interstate commerce. The law in broad terms requires all railroad companies operating roads within the State of Kentucky, whether upon lines owned or leased by them, as well as all foreign companies operating roads within the State, to furnish separate coaches or cars for the travel or transportation of white and colored passengers upon their respective lines of railroad, and to post in some conspicuous place upon each coach appropriate words in plain letters indicating the race for which it is set apart.

Of course, this law is operative only within the State. It would be satisfied if the defendant, which operates a continuous line of railway from Newport News, Virginia, to Louisville, Kentucky, should take on its westward bound trains a separate coach or coaches for colored people at its first station in Kentucky, and continue the same to Louisville; and upon its eastward bound trains take off such coach at the same station before leaving the State. The real question is whether a proper construction of the act confines its operation to passengers whose journeys commence and end within the boundaries of the State, or whether a reasonable interpretation of the act requires colored passengers to be assigned to separate coaches when traveling from or to points in other States.

Similar questions have arisen several times in this court. In *Hall* v. *De Cuir*, (95 U. S. 485,) an act of the general assembly of Louisiana prohibited common carriers of passengers within that State from making any rules or regulations discriminating on account of race or color. Plaintiff took passage upon a steamboat up the river from New Orleans to a landing place within the State, and, being refused accommodations on account of her color in the cabin especially set apart for white persons, brought an action under the provisions of this act. The vessel was engaged in trade between New Orleans and Vicksburg, Mississippi, and defendant insisted that the act was void as a regulation of commerce between these States. The State court held it to be constitutional. This court held "that while the act purported only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage.

His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

In *Louisville &c. Railroad Company* v. *Mississippi*, (133 U. S. 587,) an act of the legislature of Mississippi required almost in the terms of the Kentucky act that "all railroads carrying passengers in this State . . . shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations." The road was indicted for a violation of the statute in failing to provide separate accommodations for the two races. It will be observed that it was not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or for being prevented from riding on the train; but in that case, as in this, the prosecution was public. As the Supreme Court of Mississippi had held that the statute applied solely to commerce within the State, (66 Miss. 662,) that construction was accepted as conclusive here; and being a matter respecting commerce wholly within the State, and not interfering with commerce between the States, there was obviously no violation of the commerce clause of the Federal Constitution. Said Mr. Justice Brewer, in delivering the opinion of this court: "So far as the first section is concerned, (and it is with that alone we have to do,) its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than State statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State. No question arises under this section as to the power of the State to separate in different compartments interstate commerce passengers, or to affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause."

In *Plessy* v. *Ferguson*, (163 U. S. 537,) the petitioner Plessy had engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington in the same State, took possession of a vacant seat in the coach where white passengers were accommodated, and was ejected therefrom under the separate coach law of Louisiana, which was practically

in the same terms as the statute of Kentucky under consideration. Upon being subjected to a criminal charge, he applied for a writ of prohibition upon the ground of the unconstitutionality of the act. The Supreme Court of Louisiana held the law to be constitutional and denied the prohibition. On writ of error from this court, it was held that no question of interference with interstate commerce could possibly arise, since the East Louisiana Railway was purely a local line, with both its termini within the State of Louisiana. Indeed, the act was not claimed to be unconstitutional as an interference with interstate commerce, but its invalidity was urged upon the ground that it abridged the privileges or immunities of citizens, deprived the petitioner of his property without due process of law, and also denied him the equal protection of the laws. His contention was overruled, and the statute held to be no violation of the Fourteenth Amendment.

As already stated, the Court of Appeals of Kentucky did not discuss the constitutionality of the act in question, but held itself concluded by its previous opinion in the Lander case. That was an action instituted by Lander and his wife against the receiver of the Ohio Valley Railway, running from Evansville, Indiana, to Hopkinsville, Kentucky. Plaintiff's wife, who was joined with him in the suit, purchased a first-class ticket from Hopkinsville to Mayfield, both within the State of Kentucky; took her place in what was called the "ladies' coach," and was ejected therefrom by the conductor and assigned a seat in a smoking car, which was alleged to be small, badly ventilated, unclean, and fitted with greatly inferior accommodations. It was held by the Court of Appeals that the decisions of this court in *Louisville &c. Railway Co.* v. *Mississippi*, (133 U. S. 587,) and *Plessy* v. *Ferguson*, (163 U. S. 537,) were conclusive of the constitutionality of the act so far as plaintiffs were concerned; and that the mere fact that the railroad extended to Evansville, in the State of Indiana, could in nowise render the statute in question invalid as to the duty of the railroad to respect it. It was urged in that case, as it is in this, that the act undertook to regulate or control as to interstate passengers, and that that portion of the statute was invalid, as being in conflict with the interstate commerce clause of the Constitution; and, further, that the act was inseparable, and, therefore, must all be held invalid. In disposing of this the court observed: "We do not think that such contention is tenable. It seems to us that such contention is in conflict with the decision hereinbefore referred to, (in the Mississippi case,) and also in conflict with the well-settled rules of construction." In winding up its opinion the court made the following observation: "If it were conceded (which it is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the State, and,

therefore, it should be held valid as to such passengers. It seems to us that a passenger taking passage in this State, and railroad companies receiving passengers in this State, are bound to obey the law in respect to this matter so long as they remain within the jurisdiction of the State."

This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of *all* white and colored passengers, while they are in the State, without reference to where their journey commences and ends, and of the further contention that the policy would not have been adopted if the act had been confined to that portion of the travel which commenced and ended within the State lines. Indeed, it places the Court of Appeals of Kentucky in line with the Supreme Court of Mississippi in *Louisville &c. Railway Co.* v. *Mississippi*, (66 Miss. 662,) which had held the separate-coach law of that State valid as applied to domestic commerce. Granting that the last sentence from the opinion of the Court of Appeals, above cited, would seem to justify the railroad in placing interstate colored passengers in separate coaches, we think that this prosecution does not necessarily involve that question, and that the act must stand, so far as it is applicable to passengers traveling between two points in the State.

Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a legislature the enactment of a law which it knew to be unconstitutional, and if it were well settled that a separate coach law was unconstitutional, as applied to interstate commerce, the law applying on its face to *all* passengers should be limited to such as the legislature were competent to deal with. The Court of Appeals has found such to be the intention of the General Assembly in this case, or at least, that if such were not its intention, the law may be supported as applying alone to domestic commerce. In thus holding the act to be severable, it is laying down a principle of construction from which there is no appeal.

While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and if we were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it. In view of the language above quoted from the Lander case, it would be unbecoming for us to say that the Court of Appeals would not construe the law as applicable to domestic commerce alone, and if it did the case would fall directly within the Mississippi case, (133 U. S. 587.) We therefore feel compelled to give it that construction ourselves, and so construing it there can be no doubt as to its constitutionality. (*Plessy* v. *Ferguson*, 163 U. S. 537.)

The judgment of the Court of Appeals is therefore *Affirmed.*